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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GUADALUPE CHAIDEZ, Defendant and Appellant.	2d Crim. No. B209623 (Super. Ct. No. TA087131) (Los Angeles County)

Guadalupe Chaidez appeals a judgment after his conviction of first degree murder (Pen. Code, §§ 187, subd. (a), 189), two counts of attempted premeditated murder (§§ 187, subd. (a), 189, 664), and possession of a firearm by a felon (§ 12021, subd. (a)(1)).[1] The jury also found that: 1) he personally used and personally and intentionally discharged a firearm causing Jhonnathan Sazo's death and great bodily injury to Christian Duarte and Alfonso Chong (§ 12022.53, subds. (b), (c) & (d)), and 2) the offenses against Sazo and Duarte were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)).

We conclude, among other things, that: 1) the trial court did not abuse its discretion by denying a request near the end of trial to appoint two doctors as defense experts, 2) there was proper foundation for the admission of a note Chaidez gave to another inmate to attempt to intimidate witnesses, 3) admission of the murder victim's

[1] All statutory references are to the Penal Code.

statements to his girlfriend did not contravene Chaidez's confrontation clause rights, 4) those statements were admissible as an exception to the hearsay rule for declarations against penal interest, 5) the court did not err by admitting evidence of a prior shooting incident, 6) the instructions on voluntary manslaughter and attempted voluntary manslaughter were sufficient, 7) the first and second degree murder instructions were proper, 8) the court did not err by giving a CALCRIM No. 600 instruction on attempted murder, 9) CALCRIM No. 220 was a proper jury instruction, 10) CALCRIM No. 226 does not invite jurors to consider evidence outside the record, 11) Chaidez has not shown grounds for reversal based on prosecutorial misconduct, 12) the court did not abuse its discretion by denying Chaidez's motion for a new trial. We affirm.

FACTS

Christian Duarte and Jhonnathan Sazo were members of the 5th and Hill gang.

Chaidez was a member of the Varrio Locotes (VL) gang. His nickname was "Casper." Chaidez's girlfriend, Claudia Solis, was also a member of the VL gang.

The 5th and Hill and the VL were rival gangs. There was an ongoing "feud" between Sazo and Chaidez. Two weeks before his death, Sazo told his girlfriend that he had fired a shot at Chaidez.

There was a history of violence between Chaidez and Duarte. In 1998, Chaidez fired shots at Duarte and Duarte's cousin. Prior to that incident, Chaidez made numerous threats that he was going to shoot them.

On the evening of July 25, 2004, Duarte and Sazo went to a birthday party. In the early morning hours, a small group, which included Duarte and Sazo, were sitting and talking. Suddenly, more than 10 gun shots were fired in their direction.

Sazo, Duarte and Alfonso Chong were hit by bullets. Sazo died; Chong and Duarte were injured.

Duarte grabbed his chest and said, "Baby, I'm shot. I'm shot." His girlfriend asked, "Who shot you? Duarte answered, "Guadalupe" (Chaidez). He then "passed out."

Duarte was taken by ambulance to the hospital. Police Officer Glenn Brock accompanied him. Brock testified that Duarte was "fading in and out of consciousness," but when Brock asked him his name, he was able to answer. Brock asked, "Did you see who shot you?" Duarte responded affirmatively by nodding his head with an "up and down" motion. Brock asked, "Who it was?" Duarte would not answer; he "shook his head" from "side to side."

Two days later Police Detective John Skaggs went to the hospital. He testified that Duarte was "in pain" and a "little bit drugged." Duarte denied knowing who had shot him. Skaggs told him that his girlfriend had told police what he had said immediately after being shot. Duarte then told Skaggs that "it looked like Casper Guadalupe" (Chaidez), but "he could not be sure."

Later Skaggs interviewed Juan Avalos who was in the same hospital room as Duarte. Avalos told Skaggs that Duarte said that he was shot by Chaidez and "Spooky" from the VL gang. They came in a car, got out, walked to the group, and both had guns. Duarte also told Avalos that one of the guns was an AK47, and that he (Duarte) "had been having problems, shootings with [Chaidez] and Spooky for a long time."

Cecelia Morales testified that before the shooting she saw a black car slowly drive by twice. The driver was an "African-American person" and in the backseat was a woman, Claudia Solis, a woman she knew. Morales looked away briefly and then saw a young Hispanic man, 18 or 19 years of age, with a shaved head who was standing and firing shots at the people at the party. She testified that the shooter "looked like" Chaidez. She said it was "Claudia's boyfriend." She had recognized him because she had seen Chaidez kissing Claudia on two or three prior occasions.

Chaidez was apprehended eventually and placed in a jail holding cell. He told another inmate, "I was on the run for a year and six months and shit" and "the FBI found me." In a discussion with an inmate, Chaidez gave him advice, stating, "Say you didn't do it. That's what I'm sticking to." In another jail conversation, Chaidez told an inmate, "[T]hey're tryin[g] to give me life." The other prisoner asked him, "Did you do it?" Chaidez laughed.

Sheriff's Deputy Richard Meuhlich testified that on March 8, 2007, he searched inmate George Camacho and found a note. The unnamed author of the note said, "What's up, G. My S and R goes to you vatos, and I need a favor and see if some vato from 5 Hill by the name of Tiny and tell him that to tell his heina and Gabriela to say that they were lying, that they don't know anything--or that they don't know nothing, to tell Gabriela to tell that what she said at prelim was all a lie and that she don't know nothing to do with this case. [¶] Try to get at this fool in person or someone you trust, not on paper. His name is Christian Duarte."

Gabriela Zambrano was a witness for the prosecution. "Tiny" is a nickname for Duarte. Deputy Meuhlich testified that Chaidez and Camacho were both at the county jail on the day he found this note on Camacho. The prosecution introduced court records showing that Chaidez and Camacho were also at the same courthouse on March 8, 2007.

Police Officer Francis Coughlin, the prosecution's gang expert, testified that the 5th and Hill and VL, Hispanic gangs, were located within the territory of a larger African-American gang, the Bounty Hunter Bloods (BHB). They were allowed to operate within that territory if they did not interfere with BHB business. He said that by killing a rival gang member, Chaidez would enhance his "reputation" within his gang.

In the defense case, Kathy Pezdek, a professor of psychology, testified that "even if a witness gets a very good look at a person . . . , their ability to identify that person with the passage of time is going to drop off . . . ." She said, "[M]isidentification is more likely if witnesses observe an individual for a brief period . . . ."

Matthew Laurin, a paramedic, testified that Duarte was alert and oriented, but not able to tell the paramedics what happened. Duarte's ability to breathe was impaired. Given his "diminished mental capacity," the paramedics decided to give him "fluids to try to substitute [for] the loss of blood."

Juan Corona, a friend of Chaidez, testified that he heard the gun shots and he saw an African-American man with a rifle running "through [his] mom's building . . . ." When the police knocked on his door after the shooting, he did not tell them what he saw. He said, "[M]y mom was staying in the projects, and I didn't want to put her in danger."

DISCUSSION

I. *Denying the Defense's Request to Appoint Doctors as Medical Experts*

Chaidez contends the trial court erred by denying his request to appoint two medical experts near the end of trial. He claims it was reversible error because it prevented him from presenting evidence about Duarte's impaired ability to identify him as the shooter. We disagree.

Thirty days before trial, the defense must disclose the names of the witnesses it intends to call. (§ 1054.7; *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.) This disclosure requirement allows "parties to obtain information in order to prepare their cases and reduce the chance of surprise at trial." (*Jackson*, at p. 1201.) Appellate courts use an abuse of discretion standard in reviewing trial court decisions that exclude defense evidence that was not timely disclosed to the prosecution. (*Id.* at p. 1203.)

Near the end of trial, Chaidez's counsel requested the trial court to appoint two medical experts for the defense. He conceded that the request "is late," and that he had not talked with the doctors to determine which one would be available to testify. He claimed that medical expert testimony was relevant on the issue of Duarte's medical condition and his ability to identify Chaidez.

The prosecutor objected claiming that the request was untimely. He said defense counsel had the case for seven months, but he never disclosed the names of any doctors he intended to call at trial. The prosecution would not have adequate time to "find out about these individuals, to gather transcripts, [and] to review" their articles. The prosecutor noted that on the day trial started the prosecution was willing to continue the trial because the defense had provided late discovery. But the defense refused to continue the case after Chaidez said he would not waive time.

The trial court found that the experts should have been subpoenaed at the beginning of trial, and the defense request was untimely. It also found the defense request was procedurally deficient. It said that there was "no representation that either doctor is available to come to court." The court concluded that there was no good cause for the late disclosure because Duarte's medical condition was known to the defense for seven months.

Chaidez claims the trial court should have used an alternative discovery sanction and granted a continuance for the prosecution to prepare for the new expert witness. But the court noted that there already had been three continuances during the trial. It was concerned that granting a substantial continuance could lead to a mistrial if the jurors could not be available for a new trial schedule. Moreover, the court could reasonably infer that the discovery violations were willful. The defense made no adequate showing of any good cause for its delay. "Rather than comply with reciprocal discovery rules by giving the People the name of the witness and the proposed testimony, [Chaidez] chose to surprise the People . . . ." (*People v. Jackson*, *supra*, 15 Cal.App.4th at p. 1204.) There was no abuse of discretion.

In addition, the trial court found that Chaidez's counsel made no specific offer of proof about the testimony of these medical experts or the need for expert testimony. "Failure to make an adequate offer of proof precludes consideration of the alleged error on appeal." (*People v. Eid* (1994) 31 Cal.App.4th 114, 126.)

Even so, Chaidez has not shown prejudice. There was other testimony about Duarte's condition from which the defense could request jurors to draw negative inferences about his ability to identify Chaidez. Moreover, the prosecution's case was strong, independent of the evidence about Duarte's remark.

II. *Foundation for Admissibility of Chaidez's Note to Camacho*

Chaidez claims the court erred by admitting a handwritten note he allegedly wrote. He contends the note was highly prejudicial because: 1) it "was found on [another] inmate who had appeared in court on a previous occasion when [he] (Chaidez) also had a court appearance," and 2) it "asked assistance in contacting Duarte and telling him to press [witnesses]" to deny knowledge about the shooting.

Chaidez argues there was a lack of foundation to show that his handwriting was on that note. We disagree.

"[T]he jury may determine that a criminal defendant signed a document by comparing the handwriting on a questioned document to an authenticated exemplar of the defendant's handwriting." (*People v. Rodriguez* (2005) 133 Cal.App.4th 545, 554.)

Here there was a prior exemplar of Chaidez's handwriting admitted into evidence. Chaidez wrote a statement about a 1998 shooting incident. He claims that statement was not properly authenticated. The prosecution presented testimony from a police officer who confirmed that Chaidez had written that statement. Consequently, it was a properly authenticated exemplar, and the jury could use it to compare with the handwriting on the note in question. (*People v. Rodriguez*, *supra*, 133 Cal.App.4th at pp. 553-554.) From the content of the note, jurors could reasonably find that it referred to the witnesses in Chaidez's case, and that only he would have the motive to write it. There was no error.

Moreover, the note was highly probative evidence of Chaidez's consciousness of guilt. It was an attempt to unlawfully suppress evidence against him by intimidating the witnesses.

III. *Admitting Evidence about Sazo's Statement to His Girlfriend*

Chaidez claims the trial court erred by permitting Miriam Gomez, Sazo's former girlfriend, to testify that two weeks before his death Sazo told her that he had fired a shot at Chaidez. He claims admitting Sazo's statements violated his confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36. We disagree.

In *Crawford v. Washington*, *supra*, 541 U.S. at page 68, the Supreme Court held that a defendant's rights under the confrontation clause are implicated where the prosecution seeks to introduce testimonial hearsay. But *Crawford* does not apply to "nontestimonial hearsay." (*Ibid.*) Statements obtained from interrogations by law enforcement officials may fall within the definition of testimonial hearsay. (*People v. Cage* (2007) 40 Cal.4th 965, 987.)

Sazo's statements were made to his girlfriend, not to law enforcement officers. (*People v. Cage*, *supra*, 40 Cal.4th at p. 991.) His remarks were not "knowingly given in response to structured police questioning" and bear "no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*." (*People v. Butler* (2005) 127 Cal.App.4th 49, 59.) There was no error.

IV. *Were Sazo's Statements Inadmissible Hearsay?*

Chaidez claims the trial court erred by overruling his objection to Sazo's statements because they were inadmissible hearsay. We disagree.

"Under one of the statutory exceptions to the hearsay rule, a party may introduce in evidence, for the truth of the matter stated, an out-of-court statement by a declarant who is unavailable as a witness at trial if the statement, when made, was against the declarant's penal . . . interest." (*People v. Cudjo* (1993) 6 Cal.4th 585, 606-607.)

Sazo's statement that he shot at Chaidez is an admission that he committed a crime. This falls within this hearsay exception because it "subjects the declarant to a risk of criminal liability and therefore on its face is against the alleged declarant's penal interest." (*People v. Cudjo, supra*, 6 Cal.4th at p. 607.)

Moreover, Chaidez has not shown prejudice. Sazo's statements showed a motive for Chaidez to kill Sazo. But even had this evidence been excluded, the result would not change. The prosecution introduced other evidence showing a gang-related motive for the shooting. There was additional evidence showing an ongoing feud between Sazo and Chaidez.

V. *Admitting Evidence about a Prior Shooting Incident*

Chaidez contends the trial court erred by admitting evidence that in 1998 Chaidez had fired shots at Duarte and his cousin Israel Jauregui. He claims the court should have sustained his objections to this testimony because it was inadmissible character evidence and unduly prejudicial. We disagree.

Evidence of uncharged acts to show criminal disposition or the general propensity to commit crimes is inadmissible. (*People v. Butler*, *supra*, 127 Cal.App.4th at pp. 59-60.) But "'[e]vidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity.'" (*Id.* at p. 60.)

Here the evidence that Chaidez had previously shot at Duarte, a rival gang member, was highly probative evidence to explain Chaidez's motive for the current

shooting. In this case, gang motive was a highly relevant issue. It helped to explain the reason for what otherwise may have appeared to be only a random act of violence. This evidence was not introduced to show Chaidez's character or any general criminal disposition to commit crimes. The prior shooting incident was directly connected to the prosecution's theory of the case. Because of the importance of motive, the probative value of this evidence substantially outweighed any prejudicial impact. There was no abuse of discretion. (*People v. Butler*, *supra*, 127 Cal.App.4th at pp. 59-60.)

VI. *Voluntary Manslaughter and Attempted Voluntary Manslaughter Instructions*

Chaidez contends that the CALCRIM instructions on voluntary manslaughter and attempted voluntary manslaughter (CALCRIM Nos. 522, 570, 603 and 604) are wrong. He argues that they share the same flaw and use the same misleading language. He claims they suggest to jurors that "homicide/attempted homicide is murder/attempted murder unless the defense convinces the jury it should be 'reduced' to voluntary manslaughter/attempted voluntary manslaughter."

In support of his position, Chaidez notes that CALCRIM No. 570 states, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." He notes that this instruction also contains the following language, "In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it." From this Chaidez concludes that the burden of proof is shifted to the defense.

But Chaidez's analysis is not correct. There is no language indicating that the burden of proof is shifted. The last sentence in CALCRIM No. 570 states, "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." In addition, the trial court instructed the jury with CALCRIM No. 220, the standard reasonable doubt instruction.

From these instructions, no reasonable juror could conclude that he or she could find Chaidez guilty of any crime unless the prosecution prove all elements and met

the beyond a reasonable doubt standard. We presume the jury followed the court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) There was no error.

VII. *The First and Second Degree Murder Instructions*

Chaidez contends that the CALCRIM murder and voluntary manslaughter instructions (CALCRIM Nos. 521, 522, 570 and 601), when viewed together, are confusing. He claims that if jurors found that Chaidez had shot the victims in the heat of passion, but without any objectively reasonable provocation, these instructions would require them to find him guilty of first degree murder and preclude them from entering a second degree murder verdict. We disagree.

The trial court instructed jurors with CALCRIM No. 521, which provides, in relevant part:

"If you decide that the defendant has committed murder, *you must decide whether it is murder of the first or second degree.* [¶] The defendant has been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated and (2) the murder was committed by lying in wait. [¶] Each theory of first degree murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.

"A. *Deliberation and Premeditation*

"The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. *The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.* The defendant acted with premeditation if he decided to kill before committing the act that caused death.

"The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according

to the circumstances. *A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.* On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] . . . [¶]

"C. Lying in Wait

"The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait . . . . [¶] . . . [¶] *All other murders are of the second degree.* [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." (Italics added.)

The trial court instructed the jury with CALCRIM No. 522, which states, "*Provocation may reduce a murder from first degree to second degree* [and may reduce a murder to manslaughter]. The weight and significance of provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, *consider the provocation in deciding whether the crime was first or second degree* murder. [Also consider the provocation in deciding whether the defendant committed murder or manslaughter.]" (Italics added.)

The trial court also instructed the jury with CALCRIM No. 570, which provides, in relevant part, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] . . . AND [¶] . . . *The provocation would have caused a person of average disposition to act rashly and without due deliberation*, that is, from passion rather than from judgment." (Italics added.)

The trial court used CALCRIM No. 601 to instruct jurors on attempted murder. It states, in relevant part, "If you find the defendant guilty of attempted murder . . . you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] . . . [¶]

. . . A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." (Italics added.)

A conviction for voluntary manslaughter requires proof that the defendant killed in the heat of passion and that there was objectively reasonable provocation. But there is nothing in CALCRIM Nos. 521 and 522 that precludes jurors from finding a defendant guilty of second degree murder if he or she killed while acting in the heat of passion without any valid provocation. CALCRIM No. 521 specifically excludes from the first degree murder category, "[a] decision to kill made rashly, impulsively, or without careful consideration." That includes murders committed in the heat of passion and without valid provocation. Those would fall within the definition of second degree murder. The instructions define the types of crimes that fall within first degree murder and then state, "All other murders are of the second degree." Consequently, they direct jurors that if they find the offense to be murder, but not of the first degree, the crime is second degree murder. These instructions are not confusing. They do not restrict the juror's options. They give them the choice of finding first or second degree murder.

Chaidez suggests that the trial court should have issued an additional clarifying instruction sua sponte. But where the court uses standard CALCRIM instructions that correctly state the law, as here, a defendant should raise the issue of modification or augmentation at trial. (*People v. Geier* (2007) 41 Cal.4th 555, 579.) There was no error.

Even had the court erred, any error is harmless. "By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion . . . ." (*People v. Wharton* (1991) 53 Cal.3d 522, 572.) "The manner of killing also supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Hughes* (2002) 27 Cal.4th 287, 371.) The car carrying Chaidez's girlfriend, Solis, made two slow passes before the shooting started. Chaidez brought a gun to the scene. The jury found that Sazo and Duarte were the selected targets of a gang-

motivated shooting. They both had a longstanding feud with Chaidez. Moreover, Chaidez's defense was not based on any issue involving his state of mind at the time of the shooting. His defense was focused on the claim that he was not the shooter.

VIII. *CALCRIM No. 600*

Chaidez contends the trial court erred by instructing the jury with CALCRIM No. 600, attempted murder. He claims this was prejudicial because the instruction incorrectly expanded, and misled the jury, on the definition of the term "kill zone." We disagree.

The trial court instructed the jury with the standard CALCRIM No. 600 instruction (attempted murder), as it existed at the time of trial. It has since been revised. The court instructed jurors, in relevant part, "A person may intend to kill a specific victim or victims and at the same time intend to kill *anyone* in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Christian Duarte, Alfonso Chong and Jose Rivas, the People must prove that the defendant not only intended to kill Jhonnathan Sazo but also either intended to kill Duarte, Chong or Rivas, or *intended to kill anyone within the kill zone.* If you have a reasonable doubt whether the defendant intended to kill Duarte, Chong, Rivas[,] . . . Jhonnathan Sazo by harming *everyone in the kill zone*, then you must find the defendant not guilty of the attempted murder of Duarte, Chong, Rivas." (Italics added.)

Chaidez claims that in *People v. Bland* (2002) 28 Cal.4th 313, 329, our Supreme Court defined the term "kill zone" differently than the language used by the trial court. He notes that the court said, "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming *everyone in that victim's vicinity*.'" (*Ibid.*, italics added.) Chaidez argues that the use of the word "anyone" in the instruction conflicts with *Bland* and mandates a reversal.

Chaidez's argument was rejected in *People v. Campos* (2007) 156 Cal.App.4th 1228, 1243-1244. There the Court of Appeal noted that in one place this instruction contains the phrase *intended to kill anyone within the kill zone.* But it

concluded that the instruction was consistent with *Bland* because it later directs "the jury that it could not find [the defendant] guilty of attempted murder of [the victim] under a 'kill zone' theory unless it found that he intended to harm 'everyone' in the zone." (*Id*. at p. 1243.) It added, "A defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits, as each person in the group is at risk of death due to the shooter's indifference as to who is his victim." (*Ibid*.) We agree with the analysis in *Campos*.

Chaidez also claims that the use of the phrase "kill zone" in an instruction to jurors is argumentative. He suggests that the trial court should have eliminated this phrase from the instruction because it is "one-sided" and "unbalanced."

But this argument was also rejected by *Campos*. It noted that the instruction "merely employs a term, 'kill zone,' which was coined by our Supreme Court in *Bland* and referred to in later California Supreme Court cases. [Citation.] It does not invite inferences favorable to either party and does not integrate facts of this case as an argument to the jury. . . . We see nothing argumentative in this instruction." (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1244.)

IX. *CALCRIM No. 220*

Chaidez contends the trial court erred by giving the jury CALCRIM No. 220 because: 1) the instruction precludes the jury from considering "lack of evidence in determining whether a reasonable doubt existed," and 2) the instruction invites jurors to utilize a preponderance of evidence standard. We disagree.

The portion of the CALCRIM No. 220 instruction that Chaidez is challenging states, "In deciding whether the People have proved their case beyond a reasonable doubt, you must *impartially compare and consider all the evidence that was received throughout the entire trial.* Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (Italics added.)

There is nothing in this language that suggests that jurors may not consider lack of evidence by the prosecution or that they should use a diminished burden of proof.

California appellate courts have rejected the objections Chaidez is raising to CALCRIM No. 220. In *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509, the Court of Appeal concluded that this instruction "does not tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt. Further, the remainder of the instructions clearly conveyed to the jury the notion that the People had the burden of proving [defendant's] guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt." There was no error.

X. *CALCRIM No. 226*

Chaidez claims the trial court erred by instructing the jury with CALCRIM No. 226 because the instruction invites jurors to consider matters outside the record. He is not correct.

CALCRIM No. 226 states, in relevant part, "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, *use your common sense and experience*." (Italics added.)

Chaidez claims the words "common sense and experience" improperly invite jurors to consider matters beyond the record. But that is not the case, and courts have held that this is a proper instruction. "To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decision making, whether instructed or not." (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1240.) "CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience." (*Ibid.*) There was no error.

XI. *Prosecutorial Misconduct*

Chaidez contends the prosecutor committed prejudicial misconduct in his statements to the jury. We disagree.

"Prosecutorial misconduct is reversible under the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1124.) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*Ibid.*)

To preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition, "unless an admonition would not have cured the harm." (*People v. Davis* (2009) 46 Cal.4th 539, 612; *People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

A. *Comments about Chaidez*

Chaidez contends the prosecutor committed misconduct by suggesting that he was happy to commit murder. He claims there was no evidence to support such a claim.

In closing argument the prosecutor said, "This feud's been going on, and [Chaidez] decided it was time to end it. Not only does he feel this way about the world, I'm sure he feels this way about the dead guy. And I'm sure he was glad when he did it. I'm sure he laughed. I'm sure it was fun for him. [¶] I'm sure he was glad he had finally won the war. Ladies and Gentlemen, remember the guy with the masks tattoo on . . . the [guy's] arm? 'Happy now, cry later.'. . . [¶] . . . Defendant was happy when he had blown Sazo's head off; right? He was living the gangster life."

The Attorney General claims that Chaidez waived his objections on appeal to these remarks by not objecting and asking for an admonishment. He is correct. There was no objection to these remarks at trial. (*People v. Davis*, *supra*, 46 Cal.4th at p. 612.)

Even on the merits, the result is the same. The statements about the "feud," that Chaidez was "glad he had finally won the war," was "glad" that he killed Sazo and that "he laughed," were inferences the prosecutor was asking the jury to draw from the evidence. There was evidence to support the prosecutor's contentions. While Chaidez was in a holding cell, he told another inmate, "[T]hey're trying to give me life." The other

inmate asked him, "Did you do it?" Chaidez laughed. Coughlin, the prosecution's gang expert, testified that there was a feud between Sazo and Chaidez. Sazo and Chaidez were from rival gangs, the 5th and Hill and the VL. Coughlin said that by killing a rival gang member Chaidez enhanced his "reputation" within his gang. This means, "You get respect, which oftentimes turns into power." He said gang members often view themselves "as soldiers" in a war. Juan Corona, a defense witness, showed the jury his "masks" tattoos and said they meant "smile now, cry later."

There are multiple inferences from this evidence. But the ones the prosecutor was asking the jury to accept were not unreasonable. The claim that Chaidez was "living the gangster life" in killing Sazo is a reasonable inference from Coughlin's testimony. There was no misconduct.

B. *Mentioning the Mexican Mafia*

Chaidez contends that the prosecutor made an extraneous reference to the Mexican Mafia solely to prejudice the minds of jurors against him. He claims the remarks were improper because they were unrelated to any evidence in this case.

During closing argument, Chaidez's counsel told jurors that the area where the shooting took place "was principally controlled by a black gang," the BHB's. The defense was suggesting that a member of a Hispanic gang would not commit a gang shooting in this gang's territory.

In response, the prosecutor suggested that Chaidez's gang may have had permission from the BHB's to commit the crime in their area. He noted that Coughlin testified that Chaidez's VL gang could operate in the BHB's territory if it did not interfere with their business. Coughlin said it was possible that these two gangs could also "go out together and commit a crime." In support of this theory, the prosecutor gave examples of gangs working together regarding gang shooting incidents. He pointed to the example of the Mexican Mafia's gang edict on drive-by shootings.

The prosecutor said, "The Mexican Mafia about 15 years ago said, 'You know what all you punked out Hispanic gang members? You're causing too much attention. You're bringing too much heat on us. And you're killing too many innocent

people, and it's messing up our drug money, our gambling, our prostitution money. You are hurting [our] business.' [¶] . . . .'We're putting down an order. No one in Los Angeles will do a drive by ever again because you're killing innocent people.'"

Prosecutors "during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*People v. Williams* (1997) 16 Cal.4th 153, 221.)

Chaidez claims the reference to the Mexican Mafia is inherently prejudicial and he suggests that there was no evidence at trial about it. Corona testified that he wore a Mexican Mafia tattoo, but he was reluctant to discuss it. He said that because he was not a member of that organization, he "could get killed" because "if you're not from the Mexican Mafia, you're not supposed to mention it." The shooting incident Duarte described to Avalos was consistent with the Mexican Mafia edict of requiring shooters to get out of the car and approach their target, instead of committing a drive-by shooting. Moreover, in this case, there was an enormous amount of testimony about gangs and gang shootings, and the prosecutor was trying to refute a defense argument by making this reference. "[E]ven otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, do not constitute misconduct." (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.)

Chaidez notes that the prosecutor also discussed a movie about the Mexican Mafia entitled "American Me," and said gang advisors on the movie had been executed and that actor Edward James Olmos "went underground for seven years." We agree that these references were irrelevant to the point the prosecutor was trying to make. But in ruling on an objection prior to these remarks, the trial court admonished the jury that "argument of counsel is not evidence." No reasonable juror would ever conclude that the prosecutor was suggesting that Chaidez had anything to do with the deaths of the advisors to this film or threats to actor Olmos. The prosecutor's remarks about this film were irrelevant, but they did not rise to the level of being misconduct.

C. *Remarks about Defense Lawyers*

Chaidez claims that the prosecutor committed misconduct by making references to famous defense lawyers, denigrating their integrity, and then planting the suggestion that jurors could consider his trial counsel also to be disreputable.

The Attorney General argues that the references to the famous defense lawyers were not attacks on Chaidez's trial counsel. He claims it was part of a proper argument to advise jurors that they should consider the evidence. He contends the prosecutor was giving examples to help jurors understand that they should not be fooled or confused by improper defense tactics which invited them to consider matters other than the evidence.

"A prosecutor may vigorously argue and is not limited to 'Chesterfieldian politeness' in doing so." (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 190.) He or she may strongly attack and criticize defense theories, positions, reasoning and tactics. (*Ibid.*) But it is improper to make personal attacks on the integrity of defense counsel. (*Ibid.*)

Here the Attorney General is correct that the prosecutor made the remarks about famous defense lawyers while making an argument attacking several defense tactics that the prosecutor felt were deceptive. These included, among other things, 1) a defense argument which included personal attacks on the prosecutor's honesty, 2) a defense chart which conflicted with jury instructions, and 3) a defense attempt to have jurors base their decision on sympathy. The prosecutor was entitled to make an argument attacking these defense tactics.

The Attorney General suggests that he gave examples of what famous defense lawyers did solely to remind jurors that they should not be confused by defense tactics. But he did more than that.

The prosecutor said, "F. Lee Bailey was once quoted as saying he bet another lawyer . . . a dollar on who could pick the stupider jury, because his position was the dumber the jury, the more easily you could trick them into thinking your client is not guilty. [¶] So don't stand here, counsel, and talk about truth and justice and put me on the same level playing field as you."

The prosecutor also said, "Ladies and Gentleman Clarence Darrow is supposed to be one of the best defense attorneys there is. The movie 'To Kill a Mockingbird' is loosely based on him. [¶] He's also the lawyer who did the Twinkie defense. There was a movie made about it. And they killed this person just to see the pleasure of killing someone. And the defense was that they had eaten a Twinkie and the sugar made them so insane that they didn't know what they were doing, and it worked. They were acquitted of murder. [¶] What most people don't know is that Clarence Darrow in his very late years was disbarred, disgraced and was pretty much considered a flea-eating sleazy piece of garbage. . . . A young lawyer named F. Lee Bailey was sort of his protégé. 50 years later, F. Lee Bailey is the same guy in the O.J. trial."

The Attorney General suggests that these remarks were triggered by a defense argument that personally attacked the prosecutor's integrity. Certainly the prosecutor is entitled to respond and defend himself. But prosecutors must temper their anger with the wisdom that they do not represent themselves; they represent the People. Their goal is not to be victorious in a battle of insults with opposing counsel, but "to do justice." "Tit for tat" does not advance the People's cause.

The Attorney General contends these remarks were proper. His contention lacks merit. In addition to their being historically inaccurate and a reflection on the prosecutor's deficient education (e.g., confusing the Dan White case with Leopold and Loeb), the above-quoted remarks were not relevant to the underlying argument he was making. Moreover, the prosecutor either knew or should have known that attacking the integrity of prominent defense lawyers could lead some jurors to cast a suspicious eye on Chaidez's counsel. Simply stated, these remarks were gratuitous, unnecessary and inappropriate.

But these comments were brief in an otherwise proper argument. "It is reasonably likely that the jurors viewed the prosecutor's remarks as mere reciprocal retort" to a defense attack on the prosecutor "and gave it little to no consideration." (*People v. Young* (2005) 34 Cal.4th 1149, 1193.) Because of the strength of the prosecution's case, it is not "reasonably probable that a result more favorable to the defendant would have been

reached without" the language used by the prosecutor. (*People v. Davis*, *supra*, 46 Cal.4th at p. 612; see also *Young*, at p. 1193.) Ironically, this shows how unnecessary were these gratuitous remarks.

XII. *The Motion for a New Trial*

Chaidez filed a motion for a new trial. At the hearing his counsel claimed there was newly discovered evidence that he just received. It was a handwritten declaration from Jose Rivas. In his declaration, Rivas said he was present at the time of the shooting, that he saw the shooter, and it was not Chaidez. He did not see Chaidez "at all that night." Rivas said that after the shooting he ran home. "I did not leave or come out of my house until the morning when detectives came to my house and talked to me." He said he had "moved from the area and had no contact with anyone from the neighborhood until recently." The trial court denied the motion. Chaidez claims that was reversible error. We disagree.

"The determination of a motion for a new trial rests completely within the discretion of the trial court; on appeal, its ruling will not be disturbed unless manifest abuse of discretion appears." (*People v. Villagren* (1980) 106 Cal.App.3d 720, 729.) To prevail, the moving party must show that the evidence is newly discovered, that it could not with reasonable diligence have been produced at trial, and that it is probable it would lead to a different result. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 486.)

The trial court could reasonably find that Chaidez had not shown this evidence was newly discovered. Rivas was a witness who was known to the defense and prosecution. He had given a statement to the police four years before the filing of the new trial motion. The court wanted an offer of proof showing that Rivas's current statements were newly discovered evidence. It asked Chaidez's counsel what Rivas said to the police in 2004. But counsel was unable to give this offer of proof. He said he did not know what Rivas told the police.

The trial court found a lack of due diligence by the defense. In his declaration, Rivas said that he had moved. But in his offer of proof, Chaidez's counsel did

not specify what efforts the defense made to try to locate this witness over the four-year period.

In addition, the trial court found Rivas's conduct and credibility to be "suspect." Chaidez's counsel said that Rivas gave him the declaration that morning, but he refused to come into the courtroom to testify at the hearing on the motion for new trial. Rivas then left. The prosecutor objected claiming that the People were denied an opportunity to cross-examine Rivas. The court said, "Why would he leave? . . . [T]here's no guarantee of trustworthiness anywhere whatsoever with respect to this Mr. Rivas. . . . [¶] [W]e might not see him again for another four years." The court asked why counsel did not subpoena Rivas. Chaidez's counsel said, "I didn't have one with me." The court asked, "[W]hy didn't you come in court and get one?" He responded, "Your Honor, that's my fault."

Rivas's declaration was short and conclusory. He did not mention what he had told detectives when he was first interviewed, and he did not explain why he waited four years to come forward. There was no statement that he would be willing to testify in court. The trial court could also draw negative inferences about his ability to observe the shooting. In his declaration, Rivas said he had been drinking beer before the shooting. There was no offer of proof about whether he was intoxicated. The court could also draw a negative inference based on the defense failure to subpoena Rivas, Rivas' refusal to attend the hearing, to testify and be subject to cross-examination. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered *should be viewed with distrust*." (Evid. Code, § 412, italics added.) Chaidez has not shown an abuse of discretion.

Chaidez suggests that the trial court erred by not granting a continuance to allow Rivas to be subpoenaed to a new hearing. But the trial court has broad discretion in deciding whether to grant or deny a continuance. (*People v. Grant* (1988) 45 Cal.3d 829, 844.) A party seeking a continuance must make a sufficient showing to obtain one.

Based on Rivas's conduct, and the insufficient showing of due diligence and good cause in the offers of proof, there was no abuse of discretion.

Moreover, Chaidez's written motion for a new trial was procedurally defective. There was no evidence and no showing in that motion to support due diligence or a finding of newly discovered evidence. The trial court identified the deficiencies and the unanswered questions presented by Rivas's declaration. But there is no evidence in this record that Chaidez ever attempted to correct the deficiencies, or that he had ever renewed his motion for a new trial, filed an amended one, filed a motion for reconsideration, or that he had ever subpoenaed Rivas to a hearing on any new motion. The court's decision did not preclude him from using these alternatives. Consequently, Chaidez is not in a position to claim he was denied due process when he did not utilize available procedures.

We have reviewed Chaidez's remaining contentions and conclude that he has not shown reversible error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Allen Joseph Webster, Jr., Judge

Superior Court County of Los Angeles

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